

DNR

March 6, 2020 PROPOSED REGULATIONS REVISIONS

QUESTIONS AND ANSWERS

As of March 23, 2020

Question: "What's the rationale for making the change?" Any amplification of Parsons' explanation would be welcome.

Answer: Before 2016, the definition of "Navigable Waters" at AS 38.05.965(14) was limited to waters that were only navigable in fact under AS 38.04.062 and the Public Trust Doctrine via the Equal Footing Doctrine and the Submerged Lands Act of 1953. An existing DNR regulation, 11 AAC 51.045(d), requires DNR to retain in state ownership the beds of any "Navigable Waters" from any conveyance of land.

In 2016, the Alaska Legislature, through Chapter 14, SLA 2016, revised the definition of "navigable waters" in AS 38.05.965(14). This revision broadly expanded the definition of Navigable Water to include waters that were not navigable in fact, and to include any water, in any state, for any useful purpose. This new definition includes the beds of waters that are well beyond the limits of waters that are navigable in fact as defined under AS 38.04.062.

Under the new 2016 statutory definition, 11 AAC 51.045(d) now effectively prevents DNR from conveying the beds of most waters that are not navigable in fact to municipalities under AS 29.65 and other land disposals under Title 38.

The effect of the statutory definition change on this regulation significantly increases the costs to these municipalities to acquire their remaining land entitlement. It also increases the costs to DNR for its other types of land disposals. This is because the vast majority of non-navigable in fact rivers, streams and lakes now have to be surveyed, and to the same standards as navigable waters. Under the new definition of "Navigable Waters", the existing regulation increases survey costs to such prohibitive levels, that survey of the boundaries of these countless waterbodies from state surveys prevents municipalities from surveying and receiving their remaining municipal entitlements, and makes state land sale surveys uneconomic to perform.

The existing regulation also prevents conveyance of certain beds that were once navigable in fact but no longer contain water. For instance, public works or flood control structures may have permanently altered the course or location of a navigable waterbody. In these cases, the segregated waterway may be dry or filled and no longer navigable in fact.

In these cases of dried or filled beds of waterbodies that were formerly navigable in fact, the segregated or filled lands may be of use to the borough or municipality in which the bed is located. While state statutes and case law allow the conveyance of beds of navigable waters, subject to the reservation of public access and the Public Trust Doctrine, 11 AAC 51.045 prevents DNR from conveying those beds of waterbodies that no longer contain navigable in fact waters.

DNR believes that the revision of the statutory definition of “navigable waters” under AS 38.05.965(14) has necessitated this proposed revision to 11 AAC 51.045(d) to allow conveyance of beds of certain waters while “navigable” under the statutory definition, are not navigable in fact.

Under this proposed regulation revision, DNR will continue to retain ownership of beds of waterbodies that have been determined to be navigable in fact. This proposed regulation change will allow the department to once again convey the beds of waters that are not navigable in fact. This proposed revision would allow for continued land conveyances to municipalities under the municipal land entitlement program and allow DNR to convey beds determined not to be navigable in fact, if: the conveyance is made subject to the Public Trust Doctrine; DNR makes a written determination that the conveyance is in the best interests of the state; and the conveyance includes a clause stating that ownership will revert back to the state if the public’s use and access of the waterbed is not preserved under the Public Trust Doctrine. DNR proposes to ensure through a deed covenant and reversionary condition that the public has full use of and access to these waters under AS 38.04.062 and the Public Trust Doctrine via the Equal Footing Doctrine and the Submerged Lands Act of 1953.

Question: Further, are there specific water bodies with specific issues that prompt the proposed change?

Answer: No. This regulation would apply to almost all waterbodies defined as “Navigable Waters” under AS 38.05.965(14), but are not navigable in fact under AS 38.04.062 the Public Trust Doctrine via the Equal Footing Doctrine and the Submerged Lands Act of 1953.

Question: The proposed rule states that the State “may convey the bed of any state-owned water not described in paragraph 2 if: (A) the conveyance is made subject to the public trust doctrine...” Were state lands conveyed under AS 29.65, prior to the 2016 revision to the definition of navigable waters, subject to the public trust doctrine?

Answer: Yes, all waters that are public waters are subject to the to the public trust doctrine. Public waters are defined under 11 AAC 51.035.

Further, Land conveyed under AS 29.65, prior to the 2016 revision to the definition of navigable waters, did not include beds of waters determined to be navigable as well as public. These lands were required to be surveyed out of approved conveyances, excluded from the patents and retained in state ownership as required by 11 AAC 51.045(d).

Question: The proposed rule proposes a reversionary clause if the “owner fails to comply with the public trust doctrine”, how would this work? Since the bed of the waterbody determined to be not navigable in fact is not going to be surveyed as part of the conveyance, would the entire parcel then be subject to the reversionary clause?

Answer: DNR expects that the parties would first work together to attempt to resolve any disputes regarding a violation of the public trust doctrine. If the parties were not able to agree, and the owner continued to violate the public trust doctrine, the entire parcel would be subject to the reversionary clause unless the owner conducted a survey to separate the navigable waterbodies from the uplands.

Question: Would the municipality be required to survey the bed of water determined to be not navigable in fact in order to define the area subject to the reversionary clause?

Answer: Yes, the municipality or the then-owner would be required to conduct that survey. The survey would not have to be done for the initial conveyance, but it would have to be done in order to make only the beds of navigable waterbodies subject to the reversionary clause. Without a survey, the entire parcel would be subject to the reversionary clause. The cost of the survey would be borne by the municipality or the then-owner, as it would have been if the navigable waterbodies had been reserved from the original conveyance.

Question: If the municipality determined it is in the public interest to dispose of land conveyed under AS 29.65 into private ownership, how will the reversionary clause work?

Answer: Should a municipality convey land, acquired from the state under AS 29.65 and subject to the public trust doctrine and the reversionary clause, the subsequent owner would be subject to the same public trust doctrine and the reversionary clause as the municipality. A violation of the public trust doctrine that would trigger the state’s exercise of the reversionary clause would function in the same way against a subsequent owner as it would against the municipality.

Question: So my question is the Kenai River Special Management area has several creeks where we (Alaska Division of Parks and Outdoor Recreation) have management rights of all state-owned shore lands and water of several creeks and the riparian corridor of State-owned land 200’ landward from the ordinary high water on each

side of the creeks. Does this regulation impact these creeks? State Parks has an agreement with MLW to manage these areas.

Answer: Yes, this proposed regulation would apply to the beds of all navigable waters subject to the authority of AS 38. In the highly unlikely possibility that the department considers a disposal of lands within the Kenai River Special Management Area, this regulation provides the department the option, not a requirement, to allow the conveyance of the beds of waters that have been determined not to be navigable in fact. Under this regulation, the beds of any waters that are navigable will still be subject to the Public Trust Doctrine.